No. 80-5889

Office-Supreme Court, U.S.
FILED
MAY 30 1981
ROBERT L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

—v.—

BERNARDT S. KRAMER, Commissioner,
Ulster County Department of Social Services,
Respondent.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION CHILDREN'S RIGHTS PROJECT, NEW YORK CIVIL LIBERTIES UNION, AND CONNECTICUT CIVIL LIBERTIES UNION, *AMICI CURIAE*

ABIGAIL A. JONES
1 Chase Manhattan Plaza
New York, New York 10005
Co-operating Attorney,
American Civil Liberties Union

MARCIA ROBINSON LOWRY
(Counsel of Record)
GEORGE KANNAR
The Children's Rights Project
American Civil Liberties Union
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

MARGARET HAYMAN
Children's Rights
Project
Connecticut Civil
Liberties Union
57 Pratt Street
Hartford, Connecticut
06103

STEVEN R. SHAPIRO
New York Civil Liberties Union
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Attorneys for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI.	1
STATEMENT OF THE CASE.	3
SUMMARY OF ARGUMENT.	4
ARGUMENT	7
I. THE JUDICIAL PROCESS MUST TAKE SPECIAL COGNIZANCE OF THE FUNDAMENTAL NATURE OF THE INTERESTS AT STAKE AND THE ELUSIVENESS OF THE SUBSTANTIVE STANDARD IN PARENTAL TERMINATION CASES	7
A. Parents and Children Share Separate but Coinciding Interests in Careful Fact-Finding in Proceedings to Terminate Parental Rights . .	7
B. Decisions to Terminate Parental Rights Are Usually Made on the Basis of Intrinsically Vague and Elusive Substantive Standards	15
II. DUE PROCESS REQUIRES THAT DECISIONS TO TERMINATE THE FAMILY RELATIONSHIP BE BASED UPON CLEAR AND CONVINCING EVIDENCE.	21

Page

III. CERTIORARI SHOULD BE DISMISSED AS IMPROVIDANTLY GRANTED BECAUSE OF UNCERTAINTY IN UNDERLYING STATE LAW 36

CONCLUSION 38

TABLE OF AUTHORITIES

CASES	PAGE
Addington v. Texas, 441 U.S. 418 (1979)	21, 22, 26, 29
Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd, 545 F.2d 1137 (8th Cir. 1976)	16
Armstrong v. Manzo, 380 U.S. 545 (1965)	22
Arnett v. Kennedy, 416 U.S. 134 (1974)	35
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	37
Barr Rubber Products Co. v. Sun Rubber Co., 425 F.2d 1114 (2d Cir.), cert. denied, 400 U.S. 878 (1970)	31
Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974)	8, 10
Doe v. Delaware, appeal dismissed for want of a properly presented federal question, 49 U.S.L.W. 4250 (U.S. March 9, 1981)	16, 17
Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977)	11

CASES PAGE

Griswold v. Connecticut, 381 U.S. 479 (1965)..... 8, 10

In the Matter of Marilyn H., Docket No. B-276/80, Family Court, City of New York, Feb. 24, 1981 (Dembitz, J.)..... 37

In re Fisher, 179 F.2d 361 (7th Cir.), cert. denied sub nom. Kerner v. Fisher, 340 U.S. 825 (1950)..... 31

In re Gault, 387 U.S. 1 (1966).... 11

In re Winship, 397 U.S. 358 (1970)..... 21, 29

Lopez v. Sanchez, 34 N.Y.2d 662 (1974)..... 32

Loving v. Virginia, 388 U.S. 1 (1967)..... 8

Matter of Corey L. v. Martin L., 45 N.Y.2d 383 (1978)..... 25

Matter of Dorn "HH" v. Lawrence "II", 31 N.Y.2d 154 (1972), appeal dismissed for want of a substantial federal question sub nom. Fuchs v. Silvester, 409 U.S. 1121 (1973)..... 32

Matter of Sanjivini K., 47 N.Y.2d 374 (1979)..... 24, 25 27

CASES	PAGE
Matthews v. Eldridge, 424 U.S. 319 (1976)	28
May v. Anderson, 345 U.S. 528 (1953)	22
Meyer v. Nebraska, 262 U.S. 390 (1923)	7, 9, 10
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	8
Newton v. Burgin, 363 F. Supp. 782 (W.D.N.C. 1973), aff'd mem., 414 U.S. 1139 (1974)	30
Parham v. J.R., 442 U.S. 584 (1979)	9, 19
Pierce v. Society of Sisters, 268 U.S. 510 (1925)	7, 10
Prince v. Massachusetts, 321 U.S. 158 (1944)	8, 9, 19
Quilloin v. Walcott, 434 U.S. 246 (1978)	8
Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976)	11, 16
Roe v. Wade, 410 U.S. 113 (1973)	8, 10
Schneiderman v. United States, 320 U.S. 118 (1943)	31

CASES	PAGE
Shelton v. Tucker, 364 U.S. 479 (1960)	18
Skinner v. Oklahoma, 316 U.S. 535 (1942)	8, 10
Smith v. Organization of Foster Families, 431 U.S. 816 (1977)	9, 10, 12, 16
Stanley v. Illinois, 405 U.S. 645 (1972)	8, 9, 10, 15, 18, 22, 24
Steadman v. Securities and Exchange Commission, 49 U.S. L.W. 4174 (U.S. February 25, 1981)	35
Vance v. Terrazas, 444 U.S. 252 (1980)	33
Wisconsin v. Yoder, 406 U.S. 205 (1972)	8, 10
Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966)	31
Zablocki v. Redhail, 434 U.S. 374 (1978)	18

CASES PAGE

STATUTES

New York
Family Court Act § 622..... 27

Social Services Law § 384-b..... 24

MISCELLANEOUS

Children's Defense Fund, Children Without Homes (1978)..... 12

Kentucky Youth Advocates, The State to the Rescue; Securing Permanency for Foster Children (April 1980)..... 14

Legal Distinction between Custody and Termination Orders in Child Neglect Cases, 7 J. Family L. 66 (1967)..... 30

New Mexico Health and Social Services Department, In Limbo: A Study of New Mexico's Foster Care Children (January 1978).... 14

9 Wigmore, Evidence, § 2498 (3d ed. 1940)..... 31

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980
No. 80-5889

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION CHILDRENS RIGHTS PROJECT, NEW YORK CIVIL LIBERTIES UNION, AND CONNECTICUT CIVIL LIBERTIES UNION, AMICI CURIAE

INTEREST OF AMICI*

The American Civil Liberties Union ("ACLU") is a nationwide non-partisan organization of more than 200,000 members dedicated to defending the principles embodied in the Bill of Rights. The Children's Rights Project of the ACLU Foundation is a special project of the ACLU dedicated to asserting and defending the

---

* Letters of consent from the parties to the filing of this brief amici curiae have been filed with the Clerk of the Court.

rights of children. Central among those rights are the child's right to a stable home and to a parent-child relationship free from unwarranted state intrusion. The Children's Rights Project has participated in numerous cases throughout the United States involving the respective rights of parents and children in termination proceedings, as well as cases directed at improving conditions for children who have been removed from their homes and placed in the custody of the state.

The New York Civil Liberties Union and the Connecticut Civil Liberties Union are state affiliates of the ACLU.

STATEMENT OF THE CASE

The facts of the case are fully and adequately set forth in the Petition for Certiorari.

SUMMARY OF ARGUMENT

A long, uninterrupted line of decisions by this Court has held that the relationship between parent and child is of fundamental constitutional importance to parent and child alike. However, although the constitutional interests of children in proceedings to terminate parental rights are separate and distinct from those of parents, parent and child share an identical interest in assuring that fact-finding in termination cases be conducted in a fair and careful manner. (Point I.A.) Because the substantive standards applied in termination cases are necessarily vague, subjective, and elusive, raising the standard of proof is an especially important way of assuring careful, fair, and objective fact-finding. (Point I.B.)

No harm or risk of harm to legitimate state interests is implicated by requiring a "clear and convincing" standard in termination cases. No imminent harm to children already in the state's foster care system is occasioned by application of the standard, and New York, like most other states, has in fact declared that family reunification, not termination, is its own primary goal. Applying the "clear and convincing" standard imposes no new fiscal or administrative burden on the state, and the standard has in any event already been applied to proceedings with far less serious constitutional implications than these. (Point II)

Finally, certiorari may have been improvidently granted in this case due to the unsettled state of New York law. Cases

other than the one here on appeal have held that a "clear and convincing" standard is required by New York law, despite the contrary ruling here. (Point III)

ARGUMENT

I. THE JUDICIAL PROCESS MUST TAKE SPECIAL COGNIZANCE OF THE FUNDAMENTAL NATURE OF THE INTERESTS AT STAKE AND THE ELUSIVENESS OF THE SUBSTANTIVE STANDARD IN PARENTAL TERMINATION CASES

A. Parents and Children Share Separate But Coinciding Interests in Careful Fact-Finding in Proceedings to Terminate Parental Rights

This Court has long recognized that a compelling state interest is necessary to justify intrusion into a natural family and interference with the right of parents and children to maintain their relationship. Indeed, the Court has sometimes implied that even a compelling justification will not suffice, for

> "A host of cases, tracing their lineage to Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923), and Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925), have consistently acknowledged a 'private realm of family life which

> the state cannot enter.' Prince v. Massachusetts, 321 U.S. 158, 166 (1944). (Citations omitted.)" Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977). (Emphasis added.)

On numerous occasions, the Court has held the family relationship to be the cornerstone of a set of inviolable "liberty interests" and the center of a constitutionally protected "zone of privacy." See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Skinner v. Oklahoma, 316 U.S. 535 (1942); Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974).

A long line of the Court's decisions has particularly emphasized the fundamental constitutional significance of the relationship between parent and child. Quilloin v. Walcott, 434 U.S. 246, 255 (1978), citing, Wisconsin v. Yoder, 406

U.S. 205, 231-233 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923). See also Parham v. J.R., 442 U.S. 584, 602-3 (1979). The Court has specifically recognized that a parent has a "primary freedom" to be with his or her child, Prince v. Massachusetts, 321 U.S. 158 (1944), and that such freedom is a "basic human right" antedating the Constitution. Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 846 (1977). The Court has also made clear that the state may not limit the parent-child relationship "absent a powerful countervailing interest," even when that relationship has not previously been legitimated through the judicial process. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

Although the constitutional right of family integrity has most often been used to insulate parental decisions from state review, see, e.g., Meyer v. Nebraska, supra; Skinner v. Oklahoma, supra; Cleveland Board of Education v. LaFleur, supra; Griswold v. Connecticut, supra; Roe v. Wade, supra; Stanley v. Illinois, supra; Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510, it is clear that children as well as parents have a fundamental stake in the preservation and autonomy of the family unit. As this Court stated in Stanley v. Illinois, 405 U.S. 645, 657 (1972), the right to family integrity is an "important interest of both parent and child". Accordingly, in Smith v. Organization of Foster Families For Equality and Reform, supra, at 844,

this Court stressed that the constitutional protection granted the family was based on the "emotional attachments that derive from the intimacy of daily association." Such intimate "emotional attachments" are necessarily reciprocal ones, in which each of the participants has a linked, but plainly separate, interest.*

It follows from these holdings, and the well-established rule that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," In re Gault, 387 U.S. 1, 13 (1967), that children have an interest which is separate and apart from the interest of their parents in termination proceedings.

---

* See Duchesne v. Sugarman, 566 F.2d 817, 825 (2nd Cir. 1977); Roe v. Conn, 417 F. Supp. 769 (M.D. Ala 1976).

In this case, however, those separate interests neatly--and completely--converge. The child's best interests as well as the parent's are better served by a careful, fair decision-making process when the continuation of the child's relationship with the parent is at stake. For the child, the consequences of any decision to terminate parental rights are severe and well-documented. When the decision is erroneous, those serious consequences are needless.

Studies have indicated that placing a child in state custody, regardless of the good intentions motivating the placement, frequently results in substantial psychological damage to the child.* It not only

---

* See, e.g., Children Without Homes, (1978), survey of foster care, conducted by the Children's Defense Fund; Smith v. Organization of Foster Families, supra at 844.

means losing the constitutionally protected interest in the "emotional attachments that derive from the intimacy of daily association", but it also means being swept into the custody of a child welfare bureaucracy which acquires plenary power to make unreviewable decisions affecting all of the child's basic rights and needs. In theory, this enhanced state power has a benevolent purpose; in practice, it often has disastrous results. Moreover, theory and practice also diverge in another critical way. The placement of children in the custody of the state is intended to be only a temporary prelude to permanent adoption. In fact, studies have demonstrated that many -- perhaps most -- children whose parental relationships have been severed linger for years in foster care where they have no

parent at all.* Thus, even a benevolently motivated decision to terminate parental rights can end one trauma only to initiate others.

The significance of this Court's prior holdings to the issue now presented is therefore clear: given the truly fundamental nature of the individual liberty interests at stake in a determination to curtail parent-child liberties, and the importance of proper fact-finding concerning the ability and willingness of a particular parent to maintain a relationship with a particular child, courts must exercise extraordinary care in the fact-

---

* See e.g. New Mexico Health and Social Services Department, In Limbo: A Study of New Mexico's Foster Care Children (January 1978); Kentucky Youth Advocates, The State To The Rescue; Securing Permanency for Foster Children (April 1980).

finding process whenever the curtailment of such liberties may result. Stanley v. Illinois, supra. Where the potential curtailment of the liberties is absolute and "terminal," as it is here, the constitutional interests at stake are at their greatest, and the most careful judicial protection of them is constitutionally required, Stanley v. Illinois, supra. The separate interests of parent and child completely coincide with respect to the importance of judicial caution and careful fact-finding in such proceedings.

B. Decisions To Terminate Parental Rights Are Usually Made On The Basis of Intrinsically Vague and Elusive Substantive Standards

The need for a rigorous standard of proof is heightened in parental termination cases by the inherently subjective nature

of the legal standards which are ordinarily applied. Cf. Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd 545 F.2d 1137 (8th Cir. 1976); Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976) (3 judge court). "Success" and "failure" in child-rearing are simply incapable of objective definition. Whether or not the "fitness" standard is unconstitutionally vague because of this fact, see Doe v. Delaware, appeal dismissed for want of a properly presented federal question, 49 U.S.L.W. 4250 (U.S. March 9, 1981); Alsager v. District Court of Polk County, Iowa, supra, its substantive "looseness" is undeniable. Accordingly, this Court has specifically recognized in this area how difficult it is "to avoid decisions resting on subjective values", Smith v.

Organization of Foster Families, supra at 835, n.36. The unavoidable discretion and potential injustice which inescapably flow from such subjective evaluations can only be mitigated by taking exceptional procedural care.*

---

* The "failure to plan" - despite - "diligent efforts" standard applied in this case further complicates the problems inherent in assessing parental fitness. Because the agency filing a termination petition in New York needs to demonstrate its own lack of responsibility for the parents' "failure to plan," it acquires of necessity a conflict of interest in its attempts to "speak for" the child. Because a finding of insufficient agency efforts can derail an agency's plan for a child, the agency acquires a separate interest of its own in the presentation of evidence at a termination proceeding. In New York, therefore, the substantive standard is not only broad, it is also subject to undiscernible manipulation. It is for reasons such as these that amici have previously urged the Court to require the appointment of separate counsel for children in all proceedings to terminate parental rights. See brief of Amicus Curiae ACLU Children's Rights Project in Doe v. Delaware, supra.

The elusiveness of these substantive standards assumes, moreover, an enlarged significance in view of the fact that when fundamental rights are absolutely threatened (as opposed to when lesser rights are merely limited), the Constitution requires that the proposed state intrusion be tailored precisely to fit the legitimate end the state seeks to achieve. Zablocki v. Redhail, 434 U.S. 374, 388 (1978). See also Shelton v. Tucker, 364 U.S. 479 (1960). The requirement that the state demonstrate that "a powerful countervailing interest" outweighs the rights and liberties affected by a proposed termination, Stanley v. Illinois, supra at 651, becomes difficult to enforce when the standards for assessing those interests are vague and intrinsically subjective. Although other,

less drastic, state interferences with family life may be based upon lesser showings, see e.g., Prince v. Massachusetts, supra, or be buttressed by fewer procedural safeguards, Parham v. J.R., supra, when the proposed state intrusion is permanent termination of the rights of parent and child to have any relationship at all, and when the declared aim of the state intervention is to promote the child's "best interests" as opposed to those of the parent, the state must meet a particularly heavy substantive and procedural burden, especially when the law presumes that parents do act in their children's best interest. Parham v. J.R., supra. When the substantive standard is uniquely difficult to purge of subjectivity and bias, requiring heightened

procedural safeguards is the only effective way to protect the serious and fundamental interests at stake.

II. DUE PROCESS REQUIRES THAT DECISIONS TO TERMINATE THE FAMILY RELATIONSHIP BE BASED UPON CLEAR AND CONVINCING EVIDENCE

In Addington v. Texas, 441 U.S. 418 (1979), which required a "clear and convincing" standard of proof in involuntary commitment proceedings, this Court reiterated its belief that a heightened standard of proof represents an important means of affording due process when fundamental liberties are implicated by a proposed state action.

> "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error

> between the litigants and to indicate the relative importance attached to the ultimate decision." Addington v. Texas, supra at 423.

This Court has long recognized that the involuntary termination of a parent-child relationship is one of the most drastic of all state intrusions into individual privacy and liberty and of very high "relative importance". Consequently, involuntary termination decisions are, and long have been, surrounded by especially rigorous due process safeguards, both substantive and procedural. May v. Anderson, 345 U.S. 528 (1953); Armstrong v. Manzo, 380 U.S. 545 (1965); Stanley v. Illinois, supra.

In addition, all relevant considerations concerning allocation of the risk of error in the termination setting entirely support placing the risk of error on

the state. No significant state interest is jeopardized by application of the clear and convincing standard, while the interests of parents and children are grievously affected by erroneous decisions made under the mere preponderance standard.

New York plainly does have a parens patriae interest in protecting children from harm. But where, as here, there is no imminent danger to the children (who are already in foster care), no state interest arising from that aspect of its parens patriae power is furthered by a decision that is based upon a mere preponderance of the evidence. To the contrary, this Court has explicitly rejected the claim that the state's parens patriae interest in such proceedings is more important than the right of family integrity.

In Stanley v. Illinois, supra, at 652-53, the Court made clear,

> "that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family."

Significantly, New York has declared that its primary interest is to preserve, not sever, natural family ties.* Although

---

* For example, Section 384-b 1.(a)(ii) of the New York Social Services Law states:

> "[I]t is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home . . .."

Similarly, in Matter of Sanjivini K, 47 N.Y.2d 374 (1979), the New York Court of Appeals held that a mother's custody of her child could not be terminated on the sole ground that it was in the best interest of the child. The Court stated, at 382,

an erroneous decision to terminate parental rights destroys a family and deeply infringes fundamental rights, an erroneous decision not to terminate parental rights where the children are not in imminent danger merely errs in a direction which

---

Footnote cont'd:

> "A child, of course, is not a parent's property, but neither is the child the property of the State . . . . In many cases the State may, and under some legal systems undoubtedly does, find 'better' parents for a child even though the natural parents may be willing and able to provide proper care. But it is fundamental to our legal and social system, that it is in the best interest of the child to be raised by his parents, unless the parents are unfit."

See also Matter of Corey L. v. Martin L., 45 N.Y.2d 383 (1978).

supports the state's own most fundamental goal. Moreover, as far as the family is concerned, a final decision to terminate the parent-child relationship cannot later be reopened, even if clearly erroneous. The state, however, can always gather further evidence for a second petition to terminate the family relationship, if such evidence exists, and eventually achieve its goal. Indeed, that is precisely what happened here. As the Court held in Addington, supra, at 427, under such circumstances

> "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."

This disparity of risk does not in any way diminish if an asserted state interest in the adoption of the children

is considered. New York's Court of Appeals has repeatedly held that despite the state's interest in facilitating adoption for children, the termination standards must be strictly applied with rigorous procedural and substantive protections accorded to all parties. See, e.g., Matter of Sanjivini K, supra. In fact, a New York Family Court judge has recently ruled that the standard of proof at issue in this case is too low to satisfy due process and has read Family Court Act § 622 to require a "clear and convincing" standard. (See Point III, infra.) No state interest in seeking permanent adoptive homes for children in its care is disturbed by requiring that

termination decisions be based upon clear and convincing evidence.

Moreover, the use of the clear and convincing standard as an element of due process, unlike other procedural safeguards such as right to counsel or right to a hearing, does not impose any additional fiscal or administrative burdens on the state. Matthews v. Eldridge, 424 U.S. 319, 335 (1976). Nor does a higher standard of proof interfere with the speed and flexibility of individual Family Court procedures, or otherwise deeply affect the structure of the proceedings. Rather, it provides a nondisruptive, yet quite direct, means of "impressing the factfinder with the importance of the decision" to terminate a

parent-child relationship. Addington v. Texas, supra at 427.

Finally, the nature of a termination proceeding, as well as the interests which it infringes, further demonstrates the necessity of more than the evidentiary minimum. A termination proceeding, like the civil commitment proceeding at issue in Addington v. Texas, supra, though nominally civil, involves a state-initiated effort to deprive a private person of a fundamental liberty. In such situations, a standard greater than mere preponderance has regularly been held to apply. See, e.g., In re Winship, supra. Moreover, although termination does not involve a restriction on liberty precisely analogous to incarceration or confinement in a mental institution, it is a

permanent, rather than temporary, step,* and it also necessarily involves a finding of fault and the stigmatization such a finding ensures. In any event, neither the absence of such confinement, nor the fact that the proceeding is nominally civil, determines the standard of proof, and the Court has previously recognized the need for a higher standard of proof in several other instances where the

---

* Lower courts have found the fact that termination of the family relationship, unlike temporary removal of a child, is permanent and irreversible, to be critical to determining what process is due. See Legal Distinction between Custody and Termination Orders in Child Neglect Cases, 7 J. Fam. L. 66 (1967). In one such case, Newton v. Burgin, 363 F. Supp. 782, 785-6 (W.D.N.C. 1973), the court distinguished between the procedural safeguards necessary before the state can remove a child in an emergency for a temporary time, in that case five days, and the greater procedural safeguards necessary in proceedings to terminate the family relationship permanently.

result of a nominally "civil" proceeding brought by the government may be particularly severe, Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966) (deportation); Schneiderman v. United States, 320 U.S. 118 (1943) (denaturalization), or the ultimate decision is likely to be less than wholly reliable due to either the nature of the evidence presented or the vagueness of the substantive standard to be applied. Many such situations involve rights far less fundamental than those at stake in this case.*

---

* Clear and convincing evidence has traditionally been required for proof of fraud, 9 Wigmore, Evidence § 2498 (3rd Ed. 1940); Accord Woodby v. Immigration and Naturalization Service, 385 U S. 276, 285 n.18 (1966); Barr Rubber Products Co. v. Sun Rubber Co., 425 F.2d 1114 (2d Cir. 1970), cert. denied, 400 U.S. 878 (1970) (district court erred in applying preponderance standard to proof of patent fraud), and in proceedings to disbar attorneys, In re Fisher, 179 F.2d 361, 369-70 (7th Cir.), cert. denied, 340 U.S. 825 (1950).

Interestingly, New York itself requires the paternity of an illegitimate child to be proved by clear and convincing evidence. Lopez v. Sanchez, 34 N.Y.2d 662 (1974); Matter of Dorn "HH" v. Lawrence "II", 31 N.Y.2d 154 (1972), appeal dismissed for want of a substantial federal question, sub nom. Fuchs v. Silvester, 409 U.S. 1121 (1973). If attributing parenthood involuntarily to an individual is considered a sufficiently serious infringement of personal liberty to require clear and convincing evidence, under the Equal Protection Clause involuntary severance of the parent-child tie, deserves -- at least -- the same treatment. Erroneous determinations of paternity can always be reversed if new evidence comes to light. "Termination," by definition, cannot.

Although the State makes much of Vance v. Terrazas, 444 U.S. 252 (1980), that decision does not support the result below. In Vance, this Court held:

> ". . . expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence." Id. at 267 (100 S. Ct. at 548).

No similarly rigorous substantive showing is required here. Under New York law, the family relationship is terminated on a showing that it is "more probable than not" that parents have failed to plan for the future of their child during the time the child is in foster care and that the state has "more probably than not" tried diligently to help them make plans. That substantive standard for termination of

parental rights is flexible and open-ended, perhaps intentionally, and allows the state great latitide in presenting evidence. It does not in any way go to, nor require any proof concerning, the parent's state of mind. By contrast, a substantive standard comparable to the one involved in Vance would in these circumstances require a showing that the family members had intentionally renounced the family relationship, as is in fact required in emancipation or divorce proceedings. Because the substantive standard are so vastly different, Vance is not controlling. Certainly nothing in Vance demands automatic judicial deference to any standard of proof the legislature might impose.

To the contrary, courts will accept the legislature's choice of the standard

of proof only if there are no "countervailing constitutional constraints." Steadman v. SEC, 49 U.S.L.W. 4174, 4175 (U.S. February 25, 1981). When such considerations are present the question of how much process is due under the Constitution is one for the courts, not for the legislature. Arnett v. Kennedy, 416 U.S. 134, 167 (Powell, J., concurring) (1974). This is such a case because of the important interests at stake and the inescapably subjective standards by which those interests are weighed. Accordingly, this Court should hold that the tie between a parent and child may not be permanently severed unless the state establishes its case by "clear and convincing evidence." Any lesser standard would seriously subvert the notion of family integrity which this Court has so consistently and steadfastly guarded.

III. CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED BECAUSE OF UNCERTAINTY IN UNDERLYING STATE LAW

Although amici strongly believe that application of the "clear and convincing" standard to termination proceedings is required by the federal due process clause, there is a strong possibility that the same result is also, and separately, required by the law of New York. Since the Appellate Division, Third Department, rendered the decision on appeal here, a distinguished Family Court located in another Department has concluded that the New York statute in question requires that courts apply the "clear and convincing" standard to parental termination cases. See In The Matter

of Marilyn H., Docket No. B-276/80, Family Court, City of New York, Feb. 24, 1981 (Dembitz, J.). Thus, with an incipient split and contradiction among New York's jurisdictionally separate Departments, a resolution of this issue by the New York Court of Appeals may be anticipated. Were the New York Court of Appeals to rule that the New York Statute requires clear and convincing evidence, it would not be necessary for this Court to decide whether the contention requires that result. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348 (1936) (Brandeis, J., Concurring in part and dissenting in part).

CONCLUSION

For the reasons set forth above, the judgment appealed from should be reversed, and the case remanded for reconsideration by the trial court under the "clear and convincing" standard. In the alternative, the writ of certiorari should be dismissed as improvidently granted.

Respectfully submitted,

Steven R. Shapiro
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

Margaret Hayman
Children's Rights Project
Connecticut Civil Liberties Union
57 Pratt Street
Hartford, Connecticut 06103

Abigail A. Jones
1 Chase Manhattan Plaza
New York, N.Y. 10005
Co-operating attorney,
American Civil Liberties
Union

Marcia Robinson Lowry
(Counsel of Record)
George Kannar
The Children's Rights
Project
American Civil Liberties
Union
132 W. 43rd Street
New York, N.Y. 10036